

EXHIBIT 4
TO GREEN
DECLARATION
[MPA]

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15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN JOSE DIVISION**
18

19 I.B., by and through his Guardian ad Litem
20 GLYNNIS BOHANNON; J.W., by and through
21 his Guardian ad Litem STEVEN WRIGHT;
22 individually and on behalf of all others similarly
23 situated,

23 Plaintiffs,

24 v.

25 FACEBOOK, INC.,

26 Defendant.

Case No. CV 12-01894 BLF

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF THEIR MOTION FOR
CLASS CERTIFICATION**

Date: December 18, 2014

Time: 9:00 a.m.

Crtrm: 3 – 5th Floor

Hon. Beth Labson Freeman

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1 Plaintiffs file this Memorandum in support of their motion to certify this suit as a class
 2 action pursuant to Rule 23(b)(2), Fed. R. Civ. P., for Plaintiffs' claims for a declaratory judgment
 3 pursuant to 28 U.S.C. §2201, and for an injunction and restitution as "further necessary or proper
 4 relief" authorized by 28 U.S.C. §2202.

5 **I. INTRODUCTION**

6 In denying Facebook's Motion to Dismiss Plaintiffs' claim for declaratory relief in their
 7 Second Amended Complaint ("SAC") and Third Amended Complaint ("TAC"), this Court held
 8 that the named minor Plaintiffs present an actual controversy over their rights and those of other
 9 minors to disaffirm their purchases through their individual Facebook accounts as void or, in the
 10 alternative, voidable pursuant to the governing provisions of the California Family Code, §§
 11 6701(c), 6710. *See* Order at 5 *et seq.* (Docket No. 63). In ruling on Facebook's Motion to
 12 Dismiss Plaintiffs' SAC, the Court quoted the California Supreme Court's warning that "one
 13 *deals with infants at his peril.*" Order at 14: 19, *quoting Burnand v. Irigoyen*, 30 Cal. 2d 861,
 14 866 (1947) (Docket No. 44) (emphasis added). It is only a short step from the Court's denials of
 15 Facebook's successive motions to dismiss Plaintiffs' declaratory judgment claim to certification
 16 of a class pursuant to Rule 23(b)(2). Plaintiffs seek to certify the following class and subclass:

17 All Facebook users who are or were minor children according to Facebook's own records
 18 for the four years preceding the date on which the original complaint was filed through the
 19 date on which a class is certified ("the Minor Class"). Within the Minor Class is a subclass
 20 of Minors from whose Facebook accounts Facebook Credits were purchased ("the Minor
 21 Purchasing Subclass").

22 Plaintiffs' TAC, ¶ 36.

23 For over four years—from February 23, 2008 through June 19, 2012—Facebook's Terms
 24 and Conditions of Payment specified without qualification: "All sales are final."¹ Effective
 25

26
 27 ¹ Facebook Answer to Third Amended Class Complaint ¶4, Docket No. 62; Declaration of John
 28 R. Parker, Jr., Ex. B (Facebook Payment terms from June 3, 2009 through June 19, 2012).

June 19, 2012, Facebook deleted the statement that “All sales are final” but nevertheless stated: “*Except as otherwise stated, purchases of credits are non-refundable to the full extent permitted by law.*”² Facebook has to this date not otherwise stated, nor has it notified users, that sales to minors are void or voidable under the governing law of California. Moreover, Facebook has not at any time secured express, informed consent from parents, guardians or other owners of payment vehicles to support purchases by minor users of Facebook.

II. STATEMENT OF FACTS

Founded in 2004, Facebook is a social networking site that describes itself as “a social utility that helps people communicate more efficiently with their friends, family and coworkers.” From 2004 to December 2008, Facebook would not permit a person to open an account unless he or she was at least 18 years old. Declaration of John R. Parker, Jr. (“Parker Decl.”), Ex. A (Deposition of Allison Hendrix, 83:6-85:18.)³ In 2009, Facebook changed this policy to allow all persons over 13 to use Facebook services. *Id.* (94:2-94:11.) Although Facebook’s Terms of Use “strongly suggested” that users between the ages of 13 and 17 seek parental consent to use its services, the policy did not actually require any parental consent. *Id.* (94:6-95:1.)

According to Bill Richardson, Facebook’s Risk and Payment Operations Manager and Facebook’s 30(b)(6) designee for topics (1) how Facebook Credits function, including how they may be purchased and used by Facebook users; (2) Facebook’s processes related to requests for refunds of Credits; and (3) subjects discussed in the communication by Tara Stewart identified in FB-IB-0000536, Facebook has sold products through the Facebook Gift Shop and Facebook Games since 2008. Ex. D (Deposition of Bill Richardson, 22:10-22:14, 24:6-24:11, 50:19-51:1.) In 2010, Facebook implemented a new way for users to purchase these products using “Facebook Credits.” *Id.* (24:12-24:15, 43:25-44:2.) Facebook Credits, code-named “Facebook Zeldas” or “FBZ” were a virtual currency which game players could purchase to then spend on

² *Id.*, Ex. C. (Facebook Payment terms revised June 19, 2012).

³ All references to Exhibits refer to Exhibits to the Parker Declaration, unless otherwise noted.

1 games, apps, or other products. *Id.* (24:12-24:15, 43:25-44:2.) After this suit was filed and
2 sometime in early 2013, Facebook discontinued “Facebook Credits” and began selling
3 functionally equivalent “Facebook Payments,” which allow users to purchase items on games,
4 apps, or other products. *Id.* (87:7-87:15; 90:1-90:7.)

5 In Facebook’s Payment Terms for Facebook Developers as amended in September 6,
6 2012 (after the filing of this suit), Facebook recognizes and warns contracting developers: “You
7 acknowledge that transactions with minors may be voidable by law and you agree that you may
8 be required to refund amounts paid.” Ex. A (Deposition of Allison Hendrix, 127:21-129:17,
9 128:21-128:23.), Ex. QQ (Payment Terms, dated September 6, 2012). But Facebook tells minor
10 users that purchases are *not* refundable. In its 2009 Payments Terms, Facebook told users that
11 “purchases of credits are nonrefundable.” Ex. B (Payment Terms, dated June 3, 2009, FB-IB-
12 0004821.) In its current Community Payment Terms, Facebook tells consumers vaguely that “All
13 funding transactions are final unless required by law” Ex. HH (Payment Terms, dated March 26,
14 2014, FB-IB-0004884)—withholding from consumers the forthright statement of rights that
15 Facebook requires app developers to accept. When it sometimes provides refunds to select
16 consumers, Facebook’s statements are equally inconsistent. To users, Facebook positions the
17 refunds as unavailable or as unusual exceptions issued only as a “one-time” “courtesy” in light of
18 supposed user “confusion” Ex. DD (FB-IB-0000543).

1 [REDACTED] Though Facebook chooses to label this practice as “friendly fraud,” internal
2 Facebook discussions reveal Facebook’s admission that “friendly fraud” is not “‘real’ fraud.” Ex.
3 EE (FB-IB-0003142). To wit, as Facebook reminds developers, “virtual goods bear no cost” Ex.
4 K (FB-IB-0001369), so Facebook and developers incur no genuine loss when a user makes and
5 later voids a purchase—negating the element of actual loss suffered by the innocent party
6 required for common law fraud. CACI No. 1900.

7 Although Facebook acknowledges in its Payment Terms for Facebook Developers that
8 “transactions with minors may be voidable by law,” [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

Facebook does not recognize that a minor's purchase is voidable as a matter of law as even relevant when deciding whether to refund the minor's monies

the canned response states: "It is not our current policy to issue refunds in cases when charges were made by someone in your household or someone who is known to you." Ex. D (Deposition of Bill Richardson, 58:20-58:25), Ex. F (FB-IB-0000678)

Minors generate significant revenue for Facebook.

Minors have been precisely because of the large volume of revenue generated by transactions with minors—revenue that was not significantly reduced by refunds or credit card chargebacks.

A Facebook staff member even boasted that certain accounts belonging to

minors spent a “whopping \$3.6 million on FBZ” in the three-month period beginning October 12, 2010. Ex. H (FB-IB-0004800)

Facebook internal emails indicate that Facebook has eschewed building risk models to reduce purchase by minors because doing so would reduce “total payment volume.” Ex. D (Deposition of Bill Richardson, 78:7-78:11), Ex. I (FB-IB-0003126-0003128).

Facebook’s desire to do business with minors is tempered only in small part by the risk of minors and their parents and guardians disputing those charges through complaints to credit card issuers

In certain circumstances, costs to Facebook reach \$5.00 per chargeback. Ex. L (FB-IB-0002011). Facebook even threatens to retaliate when users request a chargeback: “[I]f you choose to dispute these charges with your credit card company or bank, *the account that made these charges may become limited and will lose certain functionality.*” Ex. GG (FB-IB-0000541) (emphasis added).

⁵ In response to these problems, Facebook has considered methods to predict what charges would be disputed by cardholders. For example, in “Project Boot Camp” Facebook considered heightened requirements for users who claimed to be under the age of 17 or over the age of 90 and who were trying to spend \$75 or more in a single transaction. Ex. D (Deposition of Bill Richardson, 62:12-63:12, Ex. M (FB-IB-0001375-0001388). In particular, such users were to be required to identify

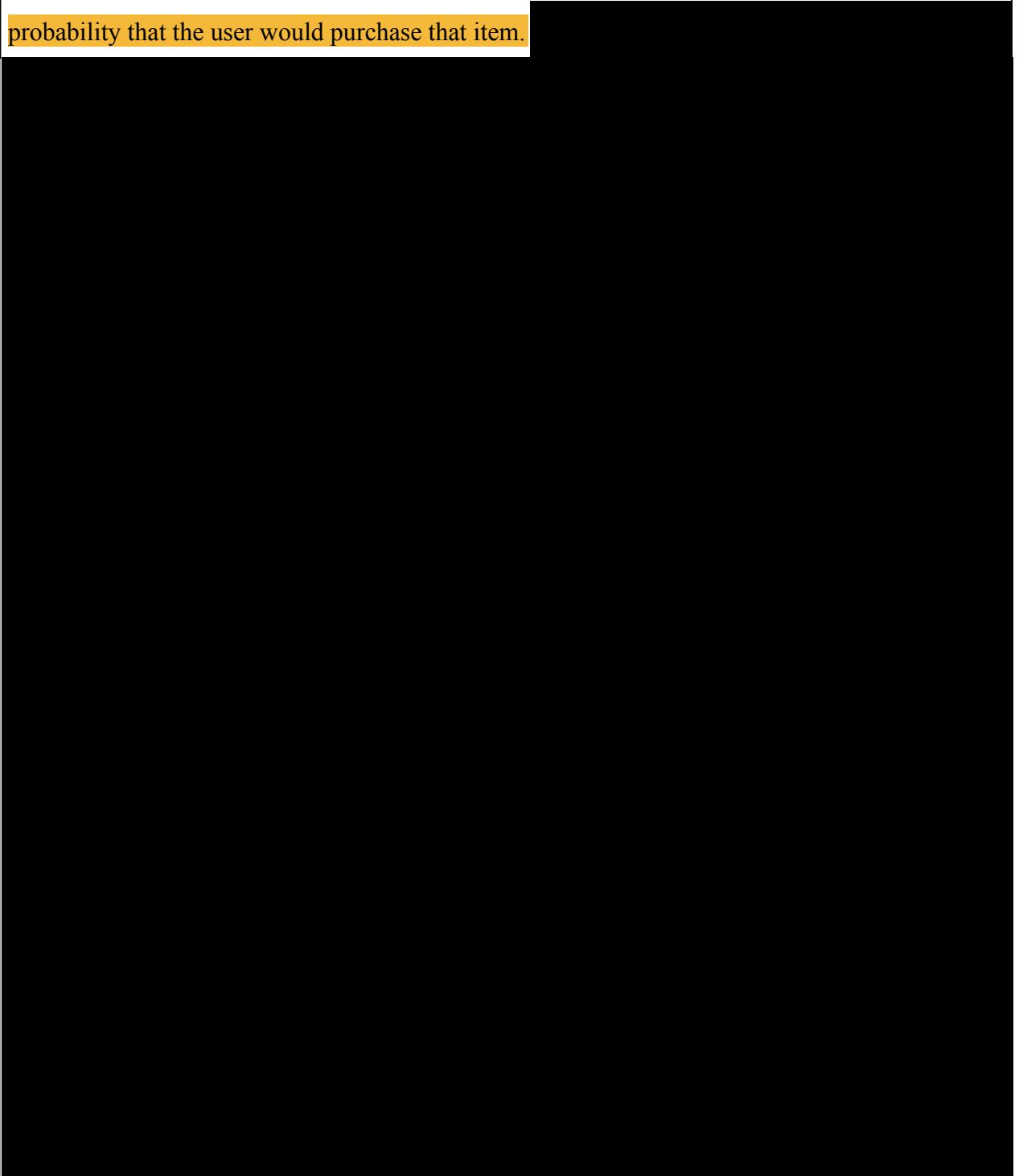
⁵ See Chargeback Management Guidelines for Visa Merchants, available at <https://usa.visa.com/download/merchants/chargeback-management-guidelines-for-visa-merchants.pdf> (last visited August 21, 2014), at PDF pgs. 45-46; Plaintiffs’ Request for Judicial Notice, Ex. 1.

the first six numbers of the payment card to make a purchase, a requirement which would require a user to prove he or she was in possession of the card (or at least remembered its number). Ex. D (Deposition of Bill Richardson, 63:6-64:20), Ex. M (FB-IB-0001375-0001388). Tara Stewart, the Risk Operations Analyst for Facebook, said that she hoped this approach would “curb the spending of the least savvy minors.” Ex. D (Deposition of Bill Richardson, 64:18-64:20), Ex. M (FB-IB-0001384.)

Facebook is aware of several reasons why minors often make purchases without permission from parent or guardian. Ms. Stewart admitted in an email that refunds are often requested because “a parent permits his child to spend at a small denomination and doesn’t realize that the credit card information will be stored.” *Id.* (64:9-65:3.) Ms. Stewart noted that a purchase made with Facebook Credits “doesn’t necessarily look like real money to a minor.” Ex. D (Deposition of Bill Richardson, 65:12-65:15), Ex. M (FB-IB-0001385.) In fact, when the developer Rovio reached out to Facebook regarding “an alarmingly high refund rate” for the game Angry Birds, Facebook analyzed the profile of users who were issued refunds. Ex. N (FB-IB-0003124-0003125). Facebook’s analysis demonstrated that the average age of the child playing was only five years old and that “in nearly all cases the parents knew their child was playing Angry Birds, but didn’t think the child would be allowed to buy anything without their password or authorization first. (Like in iOS)” *Id.* (FB-IB-0003124). A Facebook survey of users elicited complaints such as “she is only 7 years old, she did not know that she really paid (real [money],” Ex. O (FB-IB-0000900), and “Do not store our credit card info. My child was able to click one button and make the purchase” Ex. P (FB-IB-0001029).

Furthermore, Facebook employees on the Risk and Operations Team suspected that certain design decisions exacerbated the problem of purchases by minors. Facebook employee Tara Stewart expressed concern with purchases of Facebook Credits “defaulting to the highest cost setting.” Ex. D (Deposition of Bill Richardson, 65:12-65:13), Ex. M (FB-IB-0001385.)

1 According to Facebook, “lossy FF-minor heavy apps” include “PetVille, Happy Aquarium, Wild
2 Ones, Barn Buddy, and any Ninja game” Ex. M (FB-IB-00001381). A user playing any of those
3 games on Facebook might be offered a variety of virtual items for purchase, at varying price
4 points. The most expensive item would appear by default and most prominently, increasing the
5 probability that the user would purchase that item.



1 [REDACTED]
2 Ex. Q (“It appears that only 50% of users are currently receiving email receipts.”)

3 In addition to not allowing parents the ability to opt out of storing the card information
4 and not requiring minors to reenter any portion of card numbers to make a purchase, Facebook
5 has considered and failed to implement many other measures that could restrict the purchases by
6 minor users at issue in this case.
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 Facebook has experienced a significant flurry of complaints regarding minor purchases of
17 Facebook Credits and Payments. One complaint reports that a 13 year old Facebook user used
18 his father’s credit card for purchases in the game Edgeworld. Ex MM (FB-IB-0001401). An
19 internal Facebook discussion reveals that in response to a complaint for purchases made by a 15
20 year old Facebook user, Facebook refused to refund those purchases. Ex. OO (FB-IB-0009360).
21 With respect to Angry Birds, Facebook even acknowledged that nearly all parents or
22 grandparents were “surprised that the child wasn’t prompted for some sort of authorization first.”
23 Ex. II (FB-IB-0003135). Yet another user complained that after buying her son “some online
24 treat” on Facebook for about \$2 with her credit card, her son and his friend were able to make
25 more purchases on Facebook without her permission. Ex. JJ (FB-IB-0004250). According to that
26 user, the game did not require her son to enter any identification data again and simply used the
27 credit card on record, resulting in \$600 worth of purchases. See id. This user also reported

1 problems with Facebook’s forms, namely that the link on the receipt she received from Facebook
2 to refute the charge did not work. *See id.*

3 Facebook even admits that “large numbers of users seem to be having issues with the site
4 and communicating with FB,” Ex. NN (FB-IB-0001429), and an internal document illustrates
5 that there are various defects within Facebook’s contact forms. *See* Ex. KK (FB-IB-0001303-FB-
6 IB-0001304) (“Realize that translations are now broken for said form”; “I was stuck in an
7 infinite-loop of questions just today”; “It feels like the form is this Frankenstein beast that we’ve
8 bolted together.”) One user complained that after calling Facebook, contacting Facebook through
9 e-mail, and leaving a phone message, “it has been over a week and we still have not had a
10 response.” Ex. PP (Stamp FB-IB-0003729). Despite this user’s efforts, Facebook had “no records
11 of this user attempting to contact us.” *Id.*

12 Notwithstanding the voidability of purchases made by minors under California law,

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED] *See* Ex. LL (FB-IB-0001352) (reporting that it
19 would be possible to issue manual refunds as of November 1, 2011, for purchases made between
20 September 2010 and September 2011.) [REDACTED]
21 [REDACTED]

22 [REDACTED] Because money is fungible, Facebook could always issue a refund by
23 check or in other mutually-agreed method. Instead, Facebook claims to be “unable” to provide
24 such refunds, falsely suggesting that such refunds are either technically impossible or genuinely
25 prohibited by some outside authority or law.
26
27

III. ARGUMENT

A. PLAINTIFFS WILL EASILY CARRY THEIR BURDEN TO SHOW THE APPROPRIATENESS OF CLASS CERTIFICATION

As in any putative class action, Plaintiffs bear the burden of proving that certification is appropriate. *See Wal-Mart Stores, Inc. v. Dukes*, __ U.S. ___, 131 S.Ct. 2541, 2551 (2011) (“*Dukes*”). The “party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.” *Id.* As was the case prior to the *Dukes* decision, district courts are required to rigorously analyze whether Rule 23 has been satisfied. *See, e.g., Mazza v. Am. Honda Motor Corp.*, 666 F.3d 581, 588 (9th Cir.2012); *DuFour v. BE LLC*, 291 F.R.D. 413, 416 (N.D. Cal. 2013).

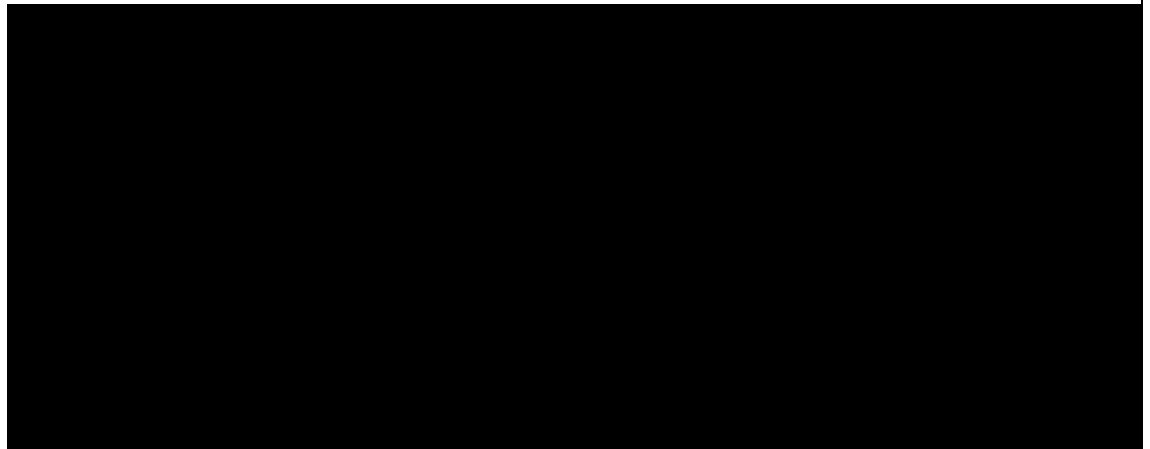
Plaintiffs here will satisfy the requirements of Rule 23(a)(1)-(4).

1. Numerosity

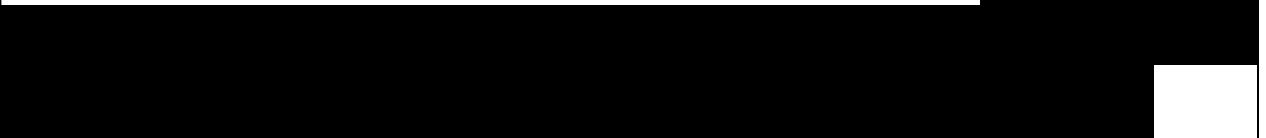
To satisfy the requirement of numerosity, the class must be so numerous that joinder of all members individually would be impracticable. *See Fed. R. Civ. P. 23(a)(1); Staton v. Boeing*, 327 F.3d 938, 953 (9th Cir.2003). “Although there is no exact number, some courts have held that numerosity may be presumed when the class comprises forty or more members.” *See Krzesniak v. Cendant Corp.*, No. 05–05156, 2007 WL 1795703, at *7 (N.D. Cal. June 20, 2007); *DuFour v. BE LLC, supra*, 291 F.R.D. at 417 (N.D. Cal. 2013).

There can be no serious issue here as to numerosity. At all times covered by this action, Facebook has allowed minors at least 13 years of age to register as users and has required users to supply dates of birth upon registration. The number of minor users at any given time is readily ascertainable as, moreover, are the identities of all minor users during the period covered by the suit and the amount of each minor user’s purchases. Facebook’s Answer to the TAC notably admits the allegation that it had over 800 million users as of the date of that pleading. Answer to TAC 3:7 (Docket No. 62).

1 In response to discovery, Facebook has estimated that from February 23, 2008 to June 25,
2 2014, its transactions with persons then under age 18 and located in the United States included:



10 One document produced by Facebook reflects an internal report that



13 Plaintiffs' class claims here accordingly satisfy the requirement of numerosity as to both the
14 Minor Class and the Minor Payment Class.

15 **2. Commonality**

16 The requirement of commonality demands that there be "questions of law or fact
17 common to the class." Rule 23(a)(2), Fed. R. Civ. P. A "single significant question of law or
18 fact" is sufficient. *Mazza*, 666 F.3d at 589; *DuFour v. BE LLC*, *supra*, 291 F.R.D. at 417.
19 Here, Facebook has established and applied common policies regarding the finality of purchases
20 that fail to recognize the voidability and/or voidness of purchases by minors under California
21 law. Facebook has at all times refrained from securing the express, informed consent of parents,
22 guardians, and other owners of payment vehicles to support purchases by minor users.⁸

24
25 ⁶ See Ex. V (*Facebook Responses & Objections to Pltfs' Special Interrogatories, Set One*
26 (*Responses 1 and 2*)).

26 ⁷ See Ex G (FB-IB-0000536- FB-IB-0000537).

27 ⁸ Moreover, Facebook's common policy of charging accounts without the express informed
28 consent of the account owners is clearly unlawful. Courts have routinely held in suits by the

Facebook has admittedly failed to establish and maintain a mechanism for securing such owners' express, informed consent to support purchases by minor users. While Facebook adjusted its policies over time, in each period Facebook's posted web pages made identical statements to all consumers as to the supposed finality of purchases.

The commonality requirement is easily satisfied here by Facebook's application of common policies regarding the finality of sales, Facebook's failure to secure express, informed consent from cardholders when minors make purchases, and Facebook's false statements to the entire class. As the Court recognized in declining to dismiss Plaintiffs' claim for declaratory judgment, the suit arises from Facebook's application of successive common policies that treat sales to minors, along with other sales, as final or at least presumptively final. Indeed, Facebook is in no position to speculate that some purchases might have been authorized. For one,

Furthermore, Facebook sends receipts.

The requirement of commonality will accordingly also be satisfied.

3. Typicality

The requirement of typicality is met if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3).

FTC that charging customer accounts without the "express informed consent" of the account owner, as Facebook has done here, is an "unfair trade practice" in violation of §5(a) of the FTCA, 15 U.S.C. §45(a). *See e.g., FTC v. Kennedy*, 574 F.Supp.2d 714, 725 (S.D. Tex. 2008); *FTC v. Wilms*, 2011 WL 4103542 at *9 (W.D. Wash. 2011). *See FTC v. Amazon.Com, Inc.*, C.A. No. 2:14-cv-01038 (W.D. Wash.) (Complaint for Permanent Injunction and Other Equitable Relief) (July 10, 2014) (alleging that Amazon's sales to minors without express informed consent from the payment-vehicle owners violates FTCA §5(a).) *See In the Matter of Apple Inc., a Corporation*, Federal Trade Commission Complaint, Docket No. C-4444 (same); Plaintiffs' Request for Judicial Notice, Ex. 2 & 3.

⁹ Ex. Q (FB-IB-0004417) ("*It appears that only 50% of users are currently receiving email receipts.*").

Representative claims need only be “reasonably co-extensive with those of absent class members; they need not be substantially identical.” See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir.1998); *DuFour v. BE LLC*, *supra*, 291 F.R.D. at 417.

The named minor Plaintiffs claim that Facebook has violated their rights as minors to disaffirm their purchases within the Facebook site. TAC ¶¶ 27-30 (Plaintiff Bohannon); ¶¶ 31-33 (Plaintiff Wright). See Exs. X, Y, Z, AA. Their claims are typical of the claims of class members whose rights of disaffirmance have also been violated by the application of Facebook’s common policy. Facebook’s application of common policies and failure to secure express, written consent from owners of payment vehicles satisfy the typicality requirement.

4. Adequacy of Representation

The requirement of adequacy of representation asks whether the representative “will fairly and adequately protect the interests of the class.” See Fed. R. Civ. P. 23(a)(4). Courts are to inquire (1) whether the named plaintiffs and counsel have any conflicts of interest with the rest of the class and (2) whether the named plaintiff and counsel will prosecute the action vigorously for the class. See *Hanlon*, 150 F.3d at 1020; *DuFour v. BE LLC*, *supra*, 291 F.R.D. at 417.

Neither the named Plaintiffs nor counsel have any conflict of interest with the rest of the class that could potentially detract from their ability fairly and adequately to represent the interests of the class. Because their own claims are typical of the claims of class members, the named plaintiffs will have every incentive to adequately represent the interests of class members. See Ex. X, Y, Z, AA. Counsel for the named Plaintiffs are experienced class action litigators who are well qualified to provide the class with adequate representation. See Parker Decl., Exs. W, BB, CC.

**B. THE SUIT IS MAINTAINABLE AS A CLASS ACTION PURSUANT TO
RULE 23(b)(2).**

**1. Plaintiffs' Claims for Declaratory and Injunctive Relief Exemplify the Type
of Action Appropriate for Certification under Rule 23(b)(2).**

A suit is properly certified under Fed. R. Civ. P. Rule 23(b)(2) when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.” *DuFour v. BE LLC*, *supra*, 291 F.R.D. at 417.

Facebook has applied successive, uniform policies which, notwithstanding minor variation over the years covered by this action, (1) treat all sales as final or at least presumptively final contrary to Family Code provisions, that provide that transactions with minors are void or voidable; and (2) fail to consider the purchaser’s status as a minor as relevant to his or her right to a refund. In doing so, Facebook “has acted or refused to act on grounds that apply generally to the class,” as required for certification under Rule 23(b)(2). The requested declaratory judgment, and attendant injunction, are forms of relief routinely available through a Rule 23(b)(2) class action.

Plaintiffs’ claims for an injunction and restitution are authorized by 28 U.S.C. § 2202 as “further necessary or proper relief” attendant to a declaration that funds are being unlawfully withheld. “Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.” C. Wright & A. Miller, *Federal Practice and Procedure*, (“Wright & Miller”), § 2771 (“[declaratory judgment may] be supplemented either by damages or by equitable relief” (footnotes omitted). *See also* Wright & Miller, *supra*, §§ 2869, 4446. Illustrative examples are *Freed v. Travelers*, 300 F.2d 395 (7th Cir. 1962) (district court may grant substantive relief in the form of a monetary judgment in declaratory judgment proceeding); *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F.2d 518 (2d Cir.

1958), *cert. denied*, 358 U.S. 831 (damages for infringement awarded to supplement declaration that plaintiff was sole copyright owner).

In *Ries v. Arizona Beverages USA LLC*, 287 F.R.D. 523 (N.D. Cal. 2012) (Seeborg, J.), complaining of deceptive product advertising, the court certified a (b)(2) class for claims of declaratory and injunctive relief. The court stated:

This case exemplifies the kind of action that may be appropriate for certification under Rule 23(b)(2), at least insofar as plaintiffs request: (1) declaratory relief that the alleged practices are unlawful, and (2) injunctive relief prohibiting defendants from continuing them. *See Dukes*, 603 F.3d at 571. Those requests can be satisfied with “indivisible” equitable relief that benefits all class members at once, as the Rule suggests.

287 F.R.D. at 541.

Insofar as plaintiffs here seek declaratory relief that Facebook’s sales to minors are void or voidable along with an attendant injunction, this case identically exemplifies the kind of action appropriate for certification under Rule 23(b)(2). This Court has several times held suits seeking declarations of voidness appropriate for certification under Rule 23(b)(2). *See, e.g., Zhu v. Fujitsu Group 401(k) Plan*, 2004 WL 3252573 at *7 (N.D. Cal. 2004) (claim for declaration that amendment to 401(k) plan was void held certifiable under Rule 23(b)(2)); *Roberts v. Heim*, 1989 WL 80403 at *7 (N.D. Cal. 1989) (claim for declaration that obligations of partnership arrangement are void because induced by fraud and for injunction certified under Rule 23(b)(2); *Nehmer v. U.S. Veterans’ Admin.*, 118 F.R.D. 113, 119 (N.D. Cal. 1987) (claim for declaration voiding Veterans’ Administration’s prior benefit denials pursuant to VA’s dioxin regulation certified pursuant to Rule 23(b)(2)).

Facebook’s Customer Assistance Policy notably includes no policy for refunds of void and/or voidable purchases by minors. Ex. E (FB-IB-00000902). In addition to a declaration that Facebook’s transactions with minors are void and/or voidable under California law, the Court can as part of a Rule 23(b)(2) class action enjoin Facebook to issue terms and conditions which

no longer declare sales to minors to be final or presumptively final; to implement policies and procedures for refunds on purchases by minor users; and to allow a sale to a minor user only upon the manifestation of express and informed consent by the payment-vehicle owner. Each of these remedies will provide real and appropriate benefits to entire Minor Class and the Minor Purchasing Subclass.

2. Certification of Plaintiffs' Claim For Restitution Is Also Appropriate Under Rule 23(b)(2) Because the Amount To be Paid For Each Class Member is Ascertainable Formulaically Without Fact Finding by the Court.

a. Plaintiffs' Proposed Trial Plan

If this case is not resolved on cross motions for summary judgment, Plaintiffs propose a class trial to determine whether purchases made by minor Facebook users are void or, in the alternative, voidable, pursuant to the governing provisions of the California Family Code, §§ 6701(c), 6710. This phase would include the presentation of evidence for the Court to make a declaratory relief ruling.

If the Court rules in favor of Facebook as to liability, the trial would proceed no further. If the Court rules that purchases made by minor users are void or, in the alternative, voidable, the Court will issue an order enjoining Facebook to issue terms and conditions which no longer declare sales to minors to be final or presumptively final; to implement policies and procedures for refunds on purchases by minor users; to allow a sale to a minor user only upon the manifestation of express and informed consent by the payment-vehicle owner; and to allow members of the Minor Purchasing Subclass the opportunity to disaffirm their transactions consistent with provisions of the California Family Code, §§ 6701(c), 6710. The amount of each class member's restitution will be easily determinable through a computer program based on

Facebook's electronic records.¹⁰ Plaintiffs contend that this approach is an efficient and judicious way to quickly bring this litigation to a close and provide relief to the class members.

b. Plaintiffs' Proposed Trial Plan Is Manageable And Consistent
With Restitution and Monetary Relief Awarded Incidental to
Declaratory Judgment Claims.

This Court will be authorized to order restitution within the context of a Rule 23(b)(2) class action. Prior to *Dukes*, numerous decisions held Rule 23(b)(2) certification appropriate for claims of monetary relief that were incidental to declaratory judgment claims. The court explained in *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998) that incidental damages should "be capable of computation by means of objective standards and not dependent in any significant way on the intangible, subjective differences of each class member's circumstances" and that liability for such damages "should not require additional hearings to resolve the disparate merits of each individual's case" and "should neither introduce new and substantial legal or factual issues, nor entail complex individualized determinations." Without deciding the question, the Supreme Court in *Dukes* recognized that Rule 23(b)(2) certification of monetary claims could remain permissible in such cases.¹¹ *Dukes, supra*, 131 S.Ct. at 2561, citing *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998).

This Court in *Ries* stated that "monetary recovery is not entirely prohibited in the (b)(2) class context." 287 F.R.D. at 541. Embracing the view of such cases as *Allison*, it held that "class claims for statutory or punitive damages that do not turn on the individual circumstances of class members may be sufficiently 'incidental' to warrant certification under (b)(2)." *Id.*

¹⁰ See fn. 13, *infra*.

¹¹ *Allison* cited as examples *Simer v. Rios*, 661 F.2d 655 (7th Cir.1981) and this Court's decision in *Arnold v. United Artists Theatre Circuit, Inc.*, 158 F.R.D. 439 (N.D.Cal.1994) (defendant's liability entitled class to a statutorily mandated damage award). See also Wright & Miller, *supra*, §1784.1 ("Damages that may be computed mechanically rather than through complex individualized determinations also may be deemed incidental, allowing certification under Rule 23(b)(2).")

1 While certifying the declaratory and injunctive claims, however, the Court in *Ries* found that the
 2 plaintiffs' accompanying restitution claims were not "incidental" to the declaratory judgment.
 3 In *Ries*, the plaintiffs sought "individualized awards of monetary restitution which would require
 4 individualized assessments of damages based on how many products the class member had
 5 bought." *Id.*¹² Here, in contrast, each class member's purchases of Facebook credit are
 6 ascertainable mechanically based on electronic data in the possession of Facebook and are easily
 7 ascertainable without further hearing by the Court.¹³

8 Consistent with *Dukes* and this Court's decision in *Ries*, courts have continued to hold
 9 that accompanying monetary claims that can be determined mechanically or formulaically may
 10 be certified under Rule 23(b)(2). For example, the Seventh Circuit held subsequent to *Dukes* that
 11 if individualized inquiries would not be required and monetary relief could be implemented by a
 12 computer program, certification under Rule 23(b)(2) would be permissible. *Johnson v. Meriter*
 13 *Health Svcs. Emp. Ret. Plan*, 702 F.3d 364, 372 (7th Cir. 2012). The court explained that if
 14 calculation of monetary relief will be "mechanical, formulaic, a task not for a trier of fact but for
 15 a computer program, so that there is no need for notice and the concerns expressed in the Wal-
 16 Mart opinion," the district court can "award that relief without terminating the class action and
 17 leaving the class members to their own devices and also without converting this (b)(2) class
 18 action to a (b)(3) class action." *Id.* See also, *Amara v. CIGNA Corp.*, 925 F.Supp.2d 242, 264
 19 (D. Conn. 2012) (monetary relief claims would not disturb Rule 23(b)(2) certification where
 20 "monetary damages will flow directly and automatically" from the requested reformation
 21 declaration); *Eddington v. UBS Financial Services, Inc.*, 2013 WL 4811061 at *6 (E.D. Tex.

22
 23
 24 ¹² The plaintiffs in *Ries* sought restitution for purchases of beverages they claimed were
 25 marketed falsely as "natural". The Court observed that their "alleged purchases [were]
 26 undocumented by receipts" and that "neither plaintiff [could] recall the precise prices they paid,
 or the exact statements on the bottling of the beverages they purchased." 287 F.R.D. at 530.

27 ¹³ Facebook's Customer Assistance Policy states that
 28

2013) (monetary claims were incidental to claims for declaratory and injunctive relief where “requested monetary relief would inure to Plaintiffs by virtue of the operation of the injunction” and calculation “would be a simple accounting.”); *Neil v. Zell*, 275 F.R.D. 256, 269 (N.D. Ill. 2011)(certification under Rule 23(b)(2) held appropriate where “the damages sought can be calculated mechanically.”) By the same token, the plaintiffs’ requests for certification of claims for money damages and restitution via a separate subclass pursuant to Rule 23(b)(3) did not preclude certification under Rule 23(b)(2) of a request for declaratory relief which would “resolve an issue common to all class members.” *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 428 (6th Cir. 2012). Here, insofar as the Court declares Facebook’s contracts with minors to be void or voidable, individualized determinations by the court will likewise be unnecessary to effect restitution.

IV. CONCLUSION

For the reasons set forth above, the Court should grant Plaintiffs’ Motion for Class Certification and certify the Class and Subclass described herein. The Court should also appoint Plaintiffs I.B., by and through his Guardian ad Litem, Glynnis Bohannon, and J.W., by and through his Guardian ad Litem, Steven Wright, as class representatives, and appoint C. Brooks Cutter and John R. Parker, Jr. and the law firm of Kershaw, Cutter & Ratinoﬀ, LLP, and Daniel B. Edelman and Benjamin G. Edelman as Class Counsel.

Dated: August 21, 2014

Respectfully submitted,

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Bohannon v. FaceBook, Inc.

USDC Northern District Court (Oakland Division) Case No. 4:12-CV-01894 CW

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2014, I caused a copy of the foregoing document to be filed electronically via the Court's electronic filing system. Those attorneys who are registered with the Court's electronic filing system may access these filings through the Court's system, and notice of these filings will be sent to these parties by operation of the Court's electronic filing system.

By: /s/John R. Parker, Jr.

John R. Parker, Jr.